82-5275

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-

LEO EDWARDS,

Petitioner,

-vs.-

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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THE QUESTION PRESENTED FOR REVIEW

Whether, in this capital case, a prospective juror was improperly excused for cause because of her scruples concerning imposition of the death penalty, notwithstanding her assertion that she would "fairly consider all of the penalties which the law has provided."

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this case on April 14, 1982.

OPINION BELOW

The decision of the Supreme Court of Mississippi is not reported. It is set-out in the Appendix, infra.

JURISDICTION

The judgment of the Supreme Court of Mississippi affirming petitioner's conviction and death sentence was entered on April 14, 1982. A timely motion for rehearing was denied on May 26, 1982. On July 16, 1982 Mr. Justice White extended the time within which to file this petition for certiorari to and including August 24, 1982.

STATEMENT OF THE CASE

Petitioner was convicted on April 3, 1981 of the crime of murder while engaged in the commission of robbery under Miss. Code Ann. §97-3-19(2)(e)(Supp. 1981), and he was sentenced to death. The Supreme Court of Mississippi affirmed the conviction and sentence.

The facts as they relate to the exclusion for cause of a juror, Ms. Pamela Hibler, because of her expressed scruples concerning the death penalty are as follows:

BY THE COURT:

I want you to listen closely to the questions that will be asked you in this regard and consider very carefully. Do any of you have any conscientious scruples against the infliction of the death penalty when the law authorizes it and in proper cases and where the testimony warrants it? Do each of you understand the question that I asked?

(Jurors nodding heads)

BY THE COURT:

Do any of you have any conscientious scruples under those circumstances?

(Jurors raising hands)

BY THE COURT:

Okay. If you will, we will just take them one at a time and, if you would, state your name first.

* * * * *

BY THE COURT:

I want you to listen to it closely again, especially all of those who raised your hands. Just listen closely to the question again. Do you have any conscientious scruples against the death penalty when the law authorizes it in proper cases and where the testimony warrants it? Now, do you understand?

* * * * *

BY THE COURT:

Thank you. And the next one is Pamela Hibler. Is that right?

BY MS. HIBLER:

Yes, sir.

BY THE COURT:

Okay.

BY MS. HIBLER:

I just don't think I could be a juror to decide on a person.

BY THE COURT:

That's what I was afraid of. I was afraid that you and Ms. Hopkins both might be misunderstanding my question. It's not a question of whether you could make the decision. It's a question of whether you have conscientious scruples about --

BY MS. HIBLER:

I have conscientious scruples and religious belief also.

BY THE COURT:

Thank you. Is there anyone else up here?

(Juror raising hand)

* * * * *

BY THE COURT:

Now, to each of you who raised your hand, I want you to listen to the next question. Even though you may have conscientious scruples against the infliction of the death penalty, I ask you whether or not you could follow the testimony and the instructions of the Court and return a verdict of guilty although that verdict could result in the death penalty if you, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict? Now, do you understand the question?

(No response)

BY THE COURT:

It's a rather detailed question and I want to make sure that each one of you understands the question. I think I'll repeat it to make sure that each one of you understands it. This is directed just to those that said they had conscientious scruples against the infliction of the death penalty. Could you follow the testimony and the instructions of the Court and return a verdict of guilty although that verdict could result in the death penalty if you, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict? Now, I'll take each one of you individually.

* * * * *

BY THE COURT:

Ms. Hibler?

BY MS. HIBLER:

I couldn't.

(R. 123-131)

In later voir dire conducted by the defense, Mrs. Hibler was questioned as follows:

BY MR. STANFIELD:

I am sorry. I had it out of order. It's Mrs. Pamela Hibler, is it not?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

Now, I believe you stated that you had religious beliefs, didn't you?

BY MRS. HIBLER:

Yes, sir.

BY MR. STANFIELD:

And I believe you stated this morning, you said: "I don't think I could be a juror". Is that what I understood you to say?

BY MRS. HIBLER:

I didn't understand you.

BY MR. STANFIELD:

Did you say this morning to Mr. Peters: "I don't think I could be a juror"?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

Could you, Mrs. Hibler, if you were stated as a juror in this case, would you do your best to set aside your personal feelings and, after hearing all the evidence, that is, the sworn evidence that comes from the witness stand, and the instructions of law which His Honor will give to you at the conclusion of the case and on that, in an effort to follow your duty as a juror, would you fairly consider all of the penalties which the law has provided?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

And you say yes?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

All right. Thank yon, Mrs. Hibler.

(R. 303, 304)

The federal constitutional question presented in this petition was raised at trial, was contained in petitioner's Assignment of Errors to the Supreme Court of Mississippi, was briefed in the Supreme Court of Mississippi, and was explicitly entertained and rejected in the opinion of the Supreme Court of Mississippi.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted so that the Court can explore the full significance of amibguous and contradictory answers given by a prospective juror in a death case in the course of voir dire relating to death penalty scruples. That exploration will provide the vehicle for instructing trial judges about their duty to make precise inquiry when a prospective juror's answers leave her qualifications up in the air on the question of conscientious scruples relating to the death penalty.

Here, Ms. Hibler, in response to the judge's question to the jurors whether any of them "have any conscientious scruples against the death penalty when the law authorizes it in proper cases and where the testimony warrants it," replied "I just don't

think I could be a juror to decide on a person." She added, "I have conscientious scruples and religious beliefs also," just echoing the judge's weak effort at clarification. He then asked

> Could you follow the testimony and the instructions of the Court and return a verdict of guilty although that verdict could result in the death penalty if you, being the judge of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict?...

Ms. Hibler replied, "I couldn't."

However, defense counsel then asked Ms. Hibler directly

> Could you, Mrs. Hibler, if you were stated as a juror in this case, would you do your best to set aside your personal feelings and, after hearing all the evidence, that is, the sworn evidence that comes from the witness stand, and the instructions of law which His Honor will give to you at the conclusion of the case and on that, in an effort to follow your duty as a juror, would you fairly consider all of the penalties which the law has provided?

She replied, "Yes."

On that record, the Supreme Court of Mississippi held that Ms. Hibler was properly excused since she had "categorically stated that she couldn't follow the testimony and instructions of the court..." (App., infra, p. 3a). But Ms. Hibler also categorically stated that she "would...fairly consider all of the penalties which the law has provided." Obviously, her answers directly contradict each other, and the trial court was then required to make further inquiry, but it did not. Adams v. Texas, 448 U.S. 38 (1980), made several observations which bear on the problem presented on this record.

> The State may insist, however that jurors will consider and decide the facts impartially and conscientiously apply the law as charted by the court. Id. at 45.
>
> ...[I]f prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Id. at 48.

Exclusion of Ms. Hibler offends both those observations because she did answer in the affirmative the question by defense counsel whether she would "set aside [her] personal feelings" and "fairly consider all of the penalties which the law has provided." An affirmative answer to that question means categorically that Ms. Hibler would not let her scruples interfere with her applying the law.

In light of Ms. Hibler's apparent inconsistent answers, it was error for the trial court to remove her from the jury for cause. It ought to have made further inquiry to clarify her position with some precision. Plenary review by this Court will provide trial courts throughout the nation with clear instructions to eliminate the kind of ambiguity inherent in this record, so that defendants in capital cases are not deprived of the fair juries to which they are entitled.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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August, 1982

10,226

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,298

LEO E. EDWARDS

v.

STATE OF MISSISSIPPI

EN BANC

BROOM, JUSTICE, FOR THE COURT:

The death penalty was ordered at Leo E. Edwards' trial upon an indictment charging him with the murder of Lindsey Don Dixon while engaged in the commission of robbery. Miss. Code Ann. § 97-3-19(2)(e) (Supp. 1981).[1] Trial was in the Circuit Court of the First Judicial District of Hinds County, the Hon. William F. Coleman, presiding. Edwards (defendant herein) appeals and asserts that the trial court erroneously (1) excused a juror for conscientious scruples against the death penalty, (2) failed to instruct the jury on circumstantial evidence, (3) allowed the state to "show a separate and distinct crime," (4) refused to reduce the "charge to murder," (5) admitted into evidence a "photograph of deceased," (6) held the evidence was sufficient, (7) allowed defendant's co-indictee to receive a life sentence, and (8) denied defendant "effective assistance of counsel." We affirm.

Defendant Edwards, his girl friend, and his co-indictee Mikel Leroy White, drove around in Jackson during the early hours of June 14, 1980. Some time later that morning, at defendant's request, White drove defendant to a convenience store on Hanging

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[1] Edwards' capital murder conviction and life imprisonment sentence for a separate murder were affirmed in Edwards v. State, No. 53,115 (Miss. S.Ct. Dec. 13, 1981).

Moss Road in Jackson. Defendant's stated purpose was to get money from a girl friend who worked there. At a nearby intersection, defendant exited the car and told White to go "one block down" and wait on a side street, which White did. After parking, White went to sleep and not long afterwards, White was awakened by defendant who reentered the car carrying a brown bag and an automatic pistol. At trial, the pistol, which had been confiscated, was identified by White. White's testimony was that the defendant told him, "Let's go, I shot somebody."

Lindsey Don Dixon was the clerk in charge of the store, a Stop-N-Go Market. Dixon's finance, a Miss Singleton, telephoned him about 4 a.m. on June 14, 1980, and during their phone conversation, Dixon put the phone down on his end of the line after telling her to "hold on." Promptly, Miss Singleton heard a gunshot followed by silence. She alerted the police and at about 4:30 a.m. officers went to the Stop-N-Go where they found Dixon dead in a pool of blood -- shot in his chest. Money was missing from the cash drawer which was in disarray. Dixon's cause of death was determined to be internal bleeding resulting from the bullet wound.

That same morning, White heard a radio news report of a store clerk's slaying on Hanging Moss Road and mentioned the report to the defendant. In reply the defendant told White he "shot the sucker" so he (the defendant) would not be identified. White testified that the defendant gave him some money after the killing but he didn't remember how much. During the early part of June 15, Officer Williams proceeded to a local rooming house to investigate a report that a woman was being threatened at gunpoint. Officer Williams found the defendant there brandishing a pistol which the officer confiscated, but the defendant escaped into the crowd. Ballistics tests established that the projectile which killed Dixon was fired from this pistol.

Three days later, on June 18, 1980, the defendant and White were stopped in North Mississippi on a traffic violation.

A fictitious name was given by the defendant who was intoxicated. The two men were taken into custody and a routine check revealed they were wanted for armed robbery and murder. After the officers there obtained a search warrant, two pistols were taken from the car's trunk. At the March, 1981 court term, the defendant was found guilty and sentenced to death.

First argument made relates to the exclusion of juror Hibler on the ground of "conscientious scruples" against the death penalty. Juror Hibler was asked by the circuit judge if she could follow the testimony and instructions of the court although the "verdict could result in the death penalty"; juror Hibler said, "I couldn't."

Upon this state of juror Hibler's voir dire examination, she was excused and the defendant urges reversible error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Having categorically stated that she couldn't follow the testimony and instructions of the court, we think that the juror was correctly excluded. The fact that upon questioning by defense counsel, Hibler stated she would try to be a "fair" juror did not qualify her in this case. Similar argument was made in Edwards v. State, supra, n.1, but there the sentence was life imprisonment whereas here the sentence is death. Thus, the two cases are not precisely analagous. For an excellent explanation of the proper method of bringing the death penalty to the attention of the special venire in capital cases, see Armstrong v. State, 214 So.2d 589 (Miss. 1968).

The second issue raised is that the lower court erred in failing to instruct the jury on circumstantial evidence. There is no merit to this argument because the defendant's accomplice, co-indictee White, gave direct testimony about the defendant's activities on the occasion in question. White's testimony was that he took the defendant to a place near the Stop-N-Go Market on Hanging Moss Road where the defendant exited after stating he was going into the store. Shortly thereafter the defendant returned with a brown bag and pistol and stated

that he had shot someone in the store to prevent his (defendant's) later identification. Later he told his co-indictee White that he "shot the sucker." Some money was given White by the defendant. In view of the testimony of the defendant's accomplice, the case against the defendant was not wholly circumstantial and therefore he was not entitled to a jury instruction which he sought on circumstantial evidence. Bullock v. State, 391 So.2d 601 (Miss. 1980).

Thirdly, the defendant argues that he was denied a constitutionally fair trial because the state was allowed to show a "separate and distinct crime." His contention is that the lower court erred in allowing Officer David Williams to give hearsay testimony that the appellant had threatened to kill a woman over some money. The matter came up when the state, in presenting its case in chief, offered the testimony of Officer David Williams who was called for his testimony regarding his seizure of a pistol from the defendant which was later established to be the weapon used in the murder of the deceased Dixon. The testimony in question of Officer Williams was as follows:

> Q. About what time was this?
>
> A. Approximately 3:00 o'clock in the morning.
>
> Q. Just continue as to what was happening at that time.
>
> A. At that time, we were engaged in a brief conversation with Mr. Freddie Tubbs when we received information that an individual was across the street at a rooming house in the doorway with a weapon and the individual stated that he was gonna kill a girl over some money.

Following the above testimony, the defendant objected and the jury was excluded while the matter was considered by the judge and the lawyers. At that time, defense counsel agreed to the court's offer to admonish the jury to disregard the statement. The court admonished the jury not to let the testimony in question "have any bearing" on their verdict and the record clearly shows that each juror raised his hand indicating his willingness to follow the court's admonishment. The record does not indicate that the state intentionally elicited the hearsay report, but

only asked Officer Williams, "What was happening at that time." Our rule is that absent a showing to the contrary, jurors are presumed to follow the court's direction with regard to testimony. Hughes v. State, 376 So.2d 1349 (Miss. 1979); Butler v. State, 375 So.2d 1039 (Miss. 1979); Gray v. State, 375 So.2d 994 (Miss. 1979); Duke v. State, 340 So.2d 727 (Miss. 1976).

We think the record clearly shows that the challenged testimony was not elicited to establish its truth or to establish that the defendant killed Dixon. As to the taking of the gun from the defendant, defense counsel stated, "We have no qualms with that." No motion or request for a mistrial was made by the defense and the court granted the defense all that was requested. In view of the context of the testimony and the court's admonishment of the jurors, the argument does not warrant reversal.

Fourthly, the defense argues that the lower court erred in denying the defendant's motion to reduce the charge against him to murder. Apparently he contends that the state's evidence did not prove a robbery within the purview of § 97-3-19(2)(e) which makes killing in the commission of robbery a capital offense.

Testimony of the state included that of Vera Avalon, a district supervisor for Stop-N-Go Markets. She stated that when she surveyed the store shortly after Dixon was shot, she discovered over a hundred dollars missing from the cash register. According to the records, investigating law officers found strewn about the floor of the store in random fashion several checks and small change. Dixon's body was found in an adjoining storage area of the store. Mikel White, the defendant's accomplice and co-indictee, testified that shortly after the event he was given money by the defendant knowing that "he had got it from the store," but he accepted it anyway so that the defendant would not "do anything" to him. We think this evidence plus the defendant's statement that he "shot the sucker" sufficiently established the crime of robbery. This is the only logical conclusion that can be drawn from the above evidence and from the lack of evidence that anyone else was connected with the store robbery or Dixon's death. Clearly the

testimony, together with reasonable inferences to be drawn from it, sufficiently proved the crime of robbery. Mitchell v. State, 402 So.2d 329 (Miss. 1981); McDaniel v. State, 356 So.2d 1151 (Miss. 1978). A similar argument was made in Voyles v. State, 362 So.2d 1236 (Miss. 1978), cert. den. 441 U.S. 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979). As was true in Voyles, the jury in the present case was adequately instructed concerning the standard of proof necessary to find the existence of a robbery. Jury Instruction No. 7 contained the following language:

> The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on June 14, 1980, in the First Judicial District of Hinds County, Mississippi, Leo E. Edwards, did then and there wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Lindsey Don Dixon, and from his person, against his will and by violence to his person, to-wit: $111.23, good and lawful money of the United States of America, or any amount, belonging to National Convenience Stores, Incorporated, A Texas Corporation, d/b/a Stop N Go no. 1075, then in the possession and under the control of Lindsey Don Dixon, then and in that event the Defendant, Leo E. Edwards is guilty of robbery; . . . .

As requested by the defendant, the court instructed the jury even more explicitly:

> The Court instructs the jury that one of the essential ingredients of capital murder, as charged in the indictment, is that the killing was committed while the Defendant was then and there engaged in the crime of robbery;
>
> The Court, therefore, instructs the Jury that in this case, unless you can say on your oath that beyond a reasonable doubt Leo E. Edwards was guilty of killing the deceased while he was then and there engaged in the crime of robbery, then it is your sworn duty to never convict Leo E. Edwards of Capital Murder, even though you may believe from the evidence beyond a reasonable doubt that he is guilty of murder.

The evidence of robbery was sufficient to submit that issue to the jury, and to support its finding of guilty beyond a reasonable doubt. Instructions given the jury on robbery were adequate, and accordingly the lower court did not err in refusing to reduce the capital murder charge to a lesser offense.

Fifth argument made is the contention that the lower court erred in admitting into evidence a photograph of the deceased used

during the testimony of forensic pathologist Dr. Rodrigo Galvez. The black and white photograph was of the deceased's body and depicted a single bullet wound to Dixon's chest. No contention is made that the photograph was not an accurate portrayal of what was included on the photograph. Our examination of the picture reveals that it is not especially gruesome and it does not show any heinous mutilation of the body, but simply establishes that the deceased's chest wound was a small caliber bullet hole. It cannot be logically said that the photograph was not helpful in enabling the doctor to describe and relate his findings. Established law in this state is that the admissibility of a photograph usually rests within the trial judge's sound judicial discretion, and we will uphold the admissibility of a photograph absent some showing of an abuse of discretion, which is not established in the present case. Steed v. State, 396 So.2d 625 (Miss. 1981).

The sixth proposition asserted by the defendant is that the jury verdict of guilty was against the weight of the credible evidence. Sifted from the testimony in the record and summarized are the following facts:

(1) Lindsey Don Dixon was murdered during a robbery of the Stop-N-Go where he worked.

(2) At the defendant's request, Mikel White let him out near a store where Edwards told White he was going into and where Dixon was killed.

(3) Promptly defendant exited the store and related that he had shot someone.

(4) White was given part of the loot by the defendant.

(5) Next day White was told by the defendant Edwards that he had "shot the sucker" to avoid identification.

(6) The gun used in the killing was recovered from the defendant's possession.

Having before it the testimony which establishes the above facts, we think the jury verdict was supported by the testimony establishing the defendant's guilt beyond a reasonable doubt. Although some of the testimony was circumstantial, the circumstantial evidence together with the testimony of co-indictee/accomplice White presented a strong case.

The seventh argument is that the lower court erred in "permitting abuse of prosecutorial discretion in allowing appellant's co-indictee to plead guilty to a life sentence for murder." Selectivity of the district attorney as to "whom he wishes to attempt to put to death" is the basis of the argument which asserts that White was allowed to plead guilty to the reduced charge of murder and receive two life sentences in return for "an agreement to testify" against Edwards.

In Culberson v. State, 379 So.2d 499 (Miss. 1979), we affirmed Culberson's conviction and death sentence and rejected his argument of abuse of prosecutorial discretion in allowing his co-indictee Pittman (who testified for the state) to plead guilty to the reduced charge of manslaughter. In Culberson, co-indictee Pittman participated in the planning and carrying out of the robbery, but here co-indictee White had a much lesser part in the crime. The record fails to support the argument that the district attorney abused his discretion in applying Mississippi's capital murder statute, and we find his action was in keeping with established law. The United States Supreme Court has recognized the exercise of prosecutorial discretion within constitutional limits. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). That prosecutors must have wide latitude in the exercise of their prosecutorial discretion is now accepted and well established in this jurisdiction. As we held in Boyington v. State, 389 So.2d 485 (Miss. 1980),

> [P]lea bargaining is an essential part of the criminal justice system. Salter v. State, 387 So.2d 81, Nos. 51,773 and 51,786, handed down July 30, 1980 [Not yet reported]; Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977); Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Id. at 490.

We are unwilling to reverse the defendant's conviction because his co-indictee was allowed to plead guilty to a charge of simple murder as a result of the discretionary judgment of the district attorney who was in charge of the prosecution.

The eighth and last defense argument asserted is that he was "denied sixth amendment rights to effective assistance of

counsel." In effect, defense counsel is charging himself with ineffectively representing his client, the defendant Edwards. The argument is based on the following statements made by defense counsel during his argument to the jury on the guilt phase:

> BY MR. STANFIELD:
>
> And yet he made deal. Mr. Peters [meaning the State] made a date with death and had to marry the devil to do it and he's been sleeping with the devil ever since that man [meaning Mikel L. White] pled guilty on January the 12th of this year.
>
> BY MR. PETERS:
>
> I move that Mr. Stanfield be held in contempt of court, that he be admonished for violating the rules of law with regard to attacking other attorneys, that he has gone outside of the record and that the jury be instructed that this lawyer has no ethics when it comes to a trial, Your Honor.
>
> BY THE COURT:
>
> Mr. Stanfield, do not attack the personal integrity of the opposing counsel and the jury will disregard the last part of the arguments. You may argue your point but in a different fashion.
>
> * * * * *
>
> BY MR. STANFIELD:
>
> I just simply stand in awe when he objects because it frightens me.
>
> BY MR. PETERS:
>
> [N]ow look, there's only so much, Your Honor, than an unethical lawyer can expect another lawyer to take before he decides he's going to go ahead and have a confrontation personally.
>
> BY THE COURT:
>
> Mr. Stanfield, I have reprimanded you twice in that regard. Now, let's stay out of personalities. Let's move along.

And the argument is based on District Attorney Peters' statement during closing argument on the guilt phase.

> BY MR. PETERS:
>
> We have not tried to mislead you. We have not tried to make remarks about people that are uncalled for and we have tried to stick to the issues. But, for some reason, defendants [sic] feel that that's not enough. They [sic] don't want you to know the truth. They [sic] don't want you to --
>
> BY MR. STANFIELD:
>
> (Interposing) Your Honor, he's doing the same thing that he hollered to high heaven about me and you made me stop.

BY THE COURT:

Yes, sir, and I'll make him stop too, Mr. Stanfield.

Defense counsel argues that after receiving two reprimands from the trial court, he became wholly ineffective for the remainder of the trial and also alienated the jury against the appellant. It is also argued that the district attorney's remarks, "But for some reason, defendants feel that that's not enough. They don't want you to know the truth" was a direct comment upon the failure of the appellant to testify.

We note that the trial court upheld defense counsel's objection to the district attorney's remarks and we find that this establishes that the circuit judge was judiciously fair in presiding over the final stage (jury argument) of the trial. Both the prosecutor and defense counsel merited the admonishment of the trial judge to "stay within the facts."

When the trial court was confronted with the defense counsel's assertion that the district attorney had been "sleeping with the devil" by accepting a guilty plea from co-indictee White, he correctly admonished defense counsel not to "attack the personal integrity of opposing counsel." We think the trial judge demonstrated much judicial statesmanship and fairness to both sides inthe way he presided throughout the trial. Upon the entire record, we think the defendant received effective assistance of counsel and in no way was his trial "offensive to the common and fundamental ideas of fairness and right." Hutchinson v. State, 391 So.2d 637 (Miss. 1980).

Presented by the record before us is testimony, which the jury had a right to accept, that the defendant committed the brutal killing while engaged in the offense of robbery. He told his co-indictee that he "shot the sucker" so that he (the defendant) could not be identified by his victim. A more calloused and unjustifiable killing could hardly be imagined.

We have carefully reviewed the record and compared it with all our decisions upholding death penalties subsequent to Jackson v. State, 337 So.2d 1242 (Miss. 1976).[2] Testimony presented at the sentencing phase of the trial establishes that the defendant had a long record of criminal convictions and had been previously sentenced as an habitual criminal. During the time of the offense in question, the defendant was an escapee from prison. He had also received a life sentence for capital murder for a murder which was committed during the same week as the offense in question. Upon analysis of the testimony here and its comparison to each of the other cases wherein we have affirmed the death penalty we must conclude that the death penalty here is not excessive in the light of the aggravating and mitigating circumstances. Execution of Edwards will not be wanton or freakish, but consistent and evenhanded with all the post-Jackson death penalty cases previously affirmed by us.

Considered in its entirety, the record shows that the defendant was vigorously and astutely represented by court appointed counsel. A fair trial was accorded the defendant. The verdict and sentence were based upon evidence which established his guilt beyond a reasonable doubt. Accordingly, affirmance is ordered, and the 2nd day of June, 1982 is fixed as the date on which the death sentence shall be executed as provided by law.

AFFIRMED.

PATTERSON, C.J., SUGG, P.J., WALKER, P.J., ROY NOBLE LEE, BOWLING, HAWKINS, DAN LEE, AND DARDEN, JJ., CONCUR.

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[2] For a listing of the felony murder death penalty cases affirmed by this Court see Bullock v. State, 391 So.2d 601 (Miss. 1980) (affirming sentence of death for felony murder) at page 612.

MANDATE FROM THE SUPREME COURT OF MISSISSIPPI

TO THE Circuit Court

of Hinds County—Greetings:

WHEREAS, on the 14th day of April, 19 82, the same being a day of the regular term of the Mississippi Supreme Court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 1st Monday of March, in the year of our Lord, 19 82, the following final judgment was rendered by the Mississippi Supreme Court, to-wit:

LEO E. EDWARDS

No. 53,298 vs.

STATE OF MISSISSIPPI

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of the First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 3rd day of April, 1981-a conviction of CAPITAL MURDER and a sentence to suffer DEATH-be and the same is hereby affirmed and this Court doth hereby fix and set Wednesday, June 2, 1982, as the date for execution of sentence and on that date by the duly and legally constituted authorities for such his crime of CAPITAL MURDER, he, the said Leo E. Edwards, be put to death in the manner and form as required by law. AND MAY THE LORD HAVE MERCY ON HIS SOUL. It is further ordered and adjudged that the County of Hinds do pay all of the costs of this appeal to be taxed.

YOU ARE THEREFORE HEREBY COMMANDED, that such execution and further proceedings be had in said cause, as according to right and justice, and the judgment of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Neville Patterson
Chief Justice of the Mississippi Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, in the City of Jackson, this the 28th day of May, A. D., 19 82

I Robt E. Domack, Clerk

, D. C.

lp (Circuit Court #S-9)

In The
Supreme Court of the United States
October Term, 1982
No. 82-5275

LEO EDWARDS,

Petitioner,

-vs.-

STATE OF MISSISSIPPI,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Leo Edwards, who is now held in the Maximum Security Unit, State Prison, Parchman, Mississippi, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Melvin L. Wulf
Clark Wulf & Levine
113 University Place
New York, New York 10003
(212) 475-3232

Attorney for Petitioner

August 19, 1982

In The

Supreme Court of the United States

October Term, 1982

No. 82 -

LEO G. EDWARDS,

Petitioner,

-vs.-

MISSISSIPPI,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

I, Leo G. Edwards, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was sentenced to death on a charge of murder. The present proceeding seeks review of that sentence which was affirmed by the Supreme Court of Mississippi on direct review.

Leo G. Edwards

Duly witnessed and sworn to
before me, a Notary Public
this day of August, 1982.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

~~81-5243~~
82-5275

LEO E. EDWARDS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
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QUESTION PRESENTED

I.

Whether, in this capital case, a prospective juror was properly excused for cause on her statement that she could not follow applicable law and court instruction where such might conceivably dictate capital punishment?

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

80-5249

LEO E. EDWARDS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Leo E. Edwards v. State of Mississippi, 413 So.2d 1007 (Miss. 1982). Rehearing was denied on May 26, 1982. A copy of the opinion affirming conviction and sentence is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3), and poses a single question for review.

STATEMENT OF THE CASE

Petitioner, Leo E. Edwards, was convicted on April 3, 1981, in the Circuit Court of Hinds County, Mississippi, of capital murder, a conviction which stemmed from his murder of Mr. Lindsey Don Dixon during commission of an armed robbery of the Jackson, Mississippi, convenience store in which Mr. Dixon was employed. Petitioner was tried during the March, 1981 court term pursuant to the bifurcated procedure mandated by the Mississippi Supreme Court in Jackson v. State, 337 So.2d 1242 (Miss. 1976) and Sections 99-19-101 to 107, Mississippi Code Annotated (Supp. 1981). At the conclusion of the guilt phase of the bifurcated trial, the jury, after proper instruction, deliberated and returned a verdict finding petitioner guilty of capital murder. Thereafter, the trial proceeded into the sentencing phase. After hearing additional evidence and receiving proper instructions from the trial judge, the jury retired to deliberate and eventually returned, in proper form, a sentence of death.

On automatic appeal to the Mississippi Supreme Court, both conviction and sentence were affirmed by a unanimous court on April 14, 1982, and an execution date of June 2, 1982 was decreed. Edwards v. State, 413 So.2d 1007 (Miss. 1982). Timely petition for rehearing was filed by petitioner's counsel and denied by the court on May 26, 1982. A stay of execution was entered by the Mississippi Supreme Court on May 28, 1982, pending disposition of petitioner's petition for writ of certiorari presently before this Court.

The facts as reflected in the transcript of the trial court proceedings establish that during the early morning hours of June 14, 1980, one Mikel White picked petitioner up at a home in northwest Jackson, Mississippi. The two men picked up petitioner's girlfriend and rode around for a while, eventually returning to Slayton Avenue. Petitioner caught White as he prepared to leave and asked to be driven to a convenience store on Hanging Moss Road,

stating that he was to get some money from a girlfriend who worked there. White agreed and the two proceeded east on Northside Drive. When they entered the intersection of Hanging Moss Road and Northside Drive, petitioner exited the car and instructed White to drive north on Hanging Moss and park and wait on a nearby side street. White did so, turning the car around so that it faced Hanging Moss Road. He then locked the doors and fell asleep. Shortly thereafter, he was awakened by Edwards, who got in the car carrying a brown bag and an automatic pistol. (The pistol was later confiscated and identified by White at trial.) He told White that he had shot someone and had initially lied to him because he did not want him to know all his business. White drove to the home at which petitioner was staying, let him out of the car, and left.

In the meantime, Miss Freddie Singleton, the fiancee of convenience store clerk Lindsey Don Dixon, had become suspicious and fearful for Dixon's safety. She had phoned him around 4:00 a.m. on June 14, 1980, while he was on duty at the Stop-N-Go Market on Hanging Moss Road, and as they spoke, was told to wait a minute while he waited on some customers. A few moments later she heard a gunshot and a loud noise, then silence. Dixon never returned to the phone and Miss Singleton called the police. The call was taken by Officer Norman Dorr, who proceeded to the store, arriving there around 4:30 a.m. He was met by other officers, and upon entering the store found the cash drawer in disarray and Dixon lying dead in a pool of blood in a back storage area. He had been shot once in the chest. A subsequent autopsy determined the cause of death to have been excessive internal bleeding as a result of the bullet wound. Closer investigation revealed money missing from the register.

Later in the morning of June 14, 1980, Mikel White heard a radio report that a store clerk had been slain on Hanging Moss Road the night before. He drove directly to the house where petitioner was staying and confronted him with the news. Petitioner stated that he "shot the sucker" because he didn't want him to identify him. He showed no remorse or concern.

During the early morning hours of June 15th, Officer David Williams responded to a charge that a woman was being threatened at gunpoint in a local rooming house. He proceeded to that location and found a man brandishing an automatic pistol. The pistol was confiscated but the suspect vanished into the crowd. The officer, however, clearly saw the man and identified him at trial as petitioner Leo E. Edwards. The gun was later turned over to authorities and determined by ballistics tests to be the weapon which killed Lindsey Dixon.

On June 18, 1980, around 9:00 a.m., petitioner and Mikel White were stopped by police in Senatobia, Mississipi, for a traffic violation. Petitioner gave a false name and appeared to be highly intoxicated. Both men were taken to the police station, where a standard check indicated they were wanted for armed robbery and murder. A search of the vehicle showed two pistols in the trunk.

At petitioner's subsequent trial, a prospective juror, Ms. Pamela Hibler, was excused for cause on her profession that she could not "follow the testimony and the instructions of the Court and return a verdict of guilty although that verdict could result in the death penalty. . ." due to her conscientious scruples against and religious objection to capital punishment. The pertinent voir dire resulting in her exclusion follows:

> BY THE COURT:
>
> I want you to listen closely to the questions that will be asked you in this regard and consider very carefully. Do any of you have any conscientious scruples against the infliction of the death penalty when the law authorizes it and in proper cases and where the testimony warrants it? Do each of you understand the question that I asked?
>
> (Jurors nodding heads)
>
> BY THE COURT:
>
> Do any of you have any conscientious scruples under those circumstances?
>
> (Jurors raising hands)

BY THE COURT:

Okay. If you will, we will just take them one at a time and, if you would, state your name first.

* * *

BY THE COURT:

I want you to listen to it closely again, especially all of those who raised your hands. Just listen closely to the question again. Do you have any conscientious scruples against the death penalty when the law authorizes it in proper cases and where the testimony warrants it? Now, do you understand?

* * *

BY THE COURT:

Thank you. And the next one is Pamela Hibler. Is that right?

BY MS. HIBLER:

Yes, sir.

BY THE COURT:

Okay.

BY MS. HIBLER:

I just don't think I could be a juror to decide on a person.

BY THE COURT:

That's what I was afraid of. I was afraid that you and Ms. Hopkins both might be misunderstanding my question. It's not a question of whether you could make the decision. It's a question of whether you have conscientious scruples about --

BY MS. HIBLER:

I have conscientious scruples and religious belief also.

BY THE COURT:

Thank you. Is there anyone else up here?

(Juror raising hand)

* * *

BY THE COURT:

Now, to each of you who raised your hand, I want you to listen to the next question. Even though you may have conscientious scruples against the infliction of the death penalty, I ask you whether or not you could follow the testimony and the instructions of the Court

and return a verdict of guilty although that verdict could result in the death penalty if you, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict? Now, do you understand the question?

(No response)

BY THE COURT:

It's a rather detailed question and I want to make sure that each one of you understands the question. I think I'll repeat it to make sure that each one of you understand it. This is directed just to those that said they had conscientious scruples against the infliction of the death penalty. Could you follow the testimony and the instructions of the Court and return a verdict of guilty although that verdict could result in the death penalty if you, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict? Now, I'll take each one of you individually.

* * *

BY THE COURT:

Ms. Hibler?

BY MS. HIBLER:

I couldn't.

(R. 123-131)

In later voir dire conducted by the defense, Mrs. Hibler was questioned as follows:

BY MR. STANFIELD:

I am sorry. I had it out of order. It's Mrs. Pamela Hibler, is it not?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

Now, I believe you stated that you had religious beliefs, didn't you?

BY MRS. HIBLER:

Yes, sir.

BY MR. STANFIELD:

And I believe you stated this morning, you said: "I don't think I could be a juror". Is that what I understood you to say?

BY MRS. HIBLER:

I didn't understand you.

BY MR. STANFIELD:

Did you say this morning to Mr. Peters: "I don't think I could be a juror"?

BY MS. HIBLER:

Yes.

BY MR. STANFIELD:

Could you, Mrs. Hibler, if you were stated as a juror in this case, would you do your best to set aside your personal feelings and, aider hearing all the evidence, that is, the sworn evidence that comes from the witness stand, and the instructions of law which His Honor will give to you at the conclusion of the case and on that, in an effort to follow your duty as a juror, would you fairly consider all of the penalties which the law has provided?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

And you say yes?

BY MRS. HIBLER:

Yes.

BY MR. STANFIELD:

All right. Thank you, Mrs. Hibler.

(R. 303-4)

REASONS FOR DENYING THE WRIT

No questions of substance are presented by petitioner's assertion that prospective juror Hibler was excluded for grounds impermissibly broader than inability to follow the law due to opposition to the death penalty. The opinion of the Mississippi Supreme Court, specifically that portion upholding the exclusion of Ms. Hibler, is not at variance with the applicable decisions and doctrines of this Court, thus, the issue here presented does not warrant judicial interpretation.

Summarized, petitioner's position appears to indicate that while he admits Ms. Hibler forcefully and unequivocally stated she could not follow the instructions of the court and the evidenced established if both tended to indicate the propriety of the death penalty, further voir dire by defense counsel rehabilitated her responses. Particularly, petitioner states that Ms. Hibler's answer of "yes" to the question "would you do your best to set aside your personal feelings . . . would fairly consider all of the penalties which the law has provided?" was starkly inconsistent with her earlier statement of opposition to the death penalty, and mandated further voir dire by the trial court judge. By petitioner's interpretation, failure to conduct further inquiry violated this Court's determination in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) that

> . . .[I]f prospective jurors are based from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Id. at 48.

We agree in theory with Adams but assert that an overall reading of the voir dire in this case reveals ample support for the Mississippi Supreme Court conclusion that "[H]aving categorically stated that she couldn't follow the testimony and instructions of the court," she was correctly excused. Edwards v. State, 413 So.2d 1007, 1009 (Miss. 1982) In reaching this decision, the state's high court necessarily determined that any rehabilitative questioning by defense counsel resulted only in Ms. Hibler's statement that "she would try to be a 'fair' juror", id., and did not qualify her or overcome her earlier disqualifying answers.

The Mississippi Supreme Court's decision on this question is in conformity with recent relevant pronouncement by the federal judiciary and does not in any manner offend the spirit of this Court's holding in Adams v. Texas, supra. To the contrary, the logic in Adams expressly recognizes that jurors may be called

from service where

> their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

id. at 44; quoting from Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

Most recently, in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), the former Fifth Circuit Court of Appeals crystallized somewhat the inherent wisdom in viewing death penalty exclusion of jurors from broad focus rather than narrowly seizing on or expecting talismanic professions of absolute opposition. Therein, faced with appellate challenge to the exclusion of three potential jurors in a capital murder case originating in Louisiana state court, the court upheld the exclusions, stating with reference to one of the three, the following:

> Petitioner charges that Ms. Brou's responses fall far short of demonstrating automatic opposition to the death penalty. He attributes the absence of Witherspoon talismanic responses on the record to the State's failure to propound hard questions about opposition to the death penalty. We disagree. If one examines the underscored portion of her statement, one clearly finds that she did state that she could not return a death sentence. When the prosecutor inquired again to assure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.
>
> * * *
>
> According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of Witherspoon. Form will not be placed over substance.

It is quite clear from the opinion in Williams that an overall reading of the voir dire is necessary in determining the correctness of an exclusion for cause on death penalty opposition grounds. Such a reading, when undertaken in the case at bar, reveals that

while Ms. Hibler professed she would "do her best" to put her personal feelings aside and consider all the penalties included in the Court's jury charge, this statement did not outweigh her previous statement that she absolutely could not impartially determine guilt where such a determination might lead to imposition of the death penalty.

This Court has provided lower tribunals with much guidance in this area by virtue of the reasoning lodged in Witherspoon and its progeny. Experience has taught that jurors will not and in practice, do not profess their opinions identically, therefore, lower courts must be accorded some leeway in interpreting and categorizing a juror's responses. To reiterate the wisdom found in Williams v. State, supra "form will not be placed over substance" — the obvious substance in the present case being proper exclusion of Ms. Hibler for inability to impartially determine guilt or innocence.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

BY: Catherine Walker Underwood
CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: Amy D. Whitten
AMY D. WHITTEN
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(601) 354-7130

CERTIFICATE

I, Amy D. Whitten, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, first class postage prepaid, a copy of the foregoing Brief In Opposition to Petition For Writ of Certiorari To The Supreme Court of Mississippi to Honorable Melvin L. Wulf, Clark Wulf & Levine, 113 University Place, New York, New York 10003.

This, the 17th day of September, A.D., 1982.

ASSISTANT ATTORNEY GENERAL

END OF DOCKET